Filed 11/30/09 Yanke v. City of Oakland CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

CHRISTOPHER YANKE, Plaintiff and Appellant, v. CITY OF OAKLAND et al., Defendants and Respondents.	A121526 (Alameda County Super. Ct. No. RG07-336330)

Appellant Christopher Yanke (Yanke), a police officer for respondent City of Oakland (the City), appeals from an order denying his petition for a writ of mandate in which he sought administrative review of the City's act of placing him on indefinite medical leave. He contends the trial court erred because the City (1) violated his due process rights; and (2) denied his right to an administrative appeal under the Public Safety Officers Procedural Bill of Rights Act. We conclude there was no error and affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

The essential facts are not in dispute. Yanke "called in sick" on November 1, 2003, and took a paid leave of absence from work. On or about January 7, 2004, a medical specialist for the City, Stephen Raffle, M.D., conducted a fitness for duty evaluation of Yanke and "cleared [him] to resume regular work duties." Yanke returned to his job as a police officer on January 20, 2004. On January 27, 2004, Yanke began

treatment with Paul Berg, Ph.D., for "stressors related to his employment" and left work again on January 31, 2004.[1]

In a letter to the City dated April 7, 2004, Berg stated he was "currently treating [Yanke] for a stress related condition" and noted that Yanke's prior treating physician had found Yanke to be "disabled." Berg stated, "Based on my contacts with him . . . it is my opinion that he continues to be totally and temporarily disabled from performing any job duties. I have advised him that he is on a continuing disability . . . Please consider him to be disabled until May 7, 2004." In a letter to the City dated May 5, 2004, Berg stated Yanke "continues to be totally and temporarily disabled from performing any job duties. I am extending his disability through June 7, 2004." Berg submitted similar letters to the City extending Yanke's period of disability on June 2, 2004, June 30, 2004, July 28, 2004, September 1, 2004, October 1, 2004, November 3, 2004, December 1, 2004, January 5, 2005, February 2, 2005, and March 9, 2005.

On March 29, 2005, Berg wrote to the City stating he had been treating Yanke on a weekly basis, then every two weeks, since January 27, 2004. He reported that Yanke's "treatment is now at the point where both he and I believe that it may be appropriate for him to attempt a return to work." He suggested the City "find some 'inside' job that [Yanke] can do where he can avoid the various stressors and the encounters that he is fearful about, which would occur during street duty." He specifically recommended that the City find a position for Yanke in the Technology Department. He stated, "Obviously my recommendation is centered on his avoiding as much stress as possible. Part of that will include continuing his present treatment regimen with me. He should be allowed time off during his shift to attend his continuing bi-weekly psychotherapy sessions with me in my office." He continued, "I cannot say how successful this trial return to work will be, but obviously I feel that it is a worthwhile effort now in order to judge whether or

[1] Yanke was on paid sick leave from January 31, 2004, to June 4, 2004, unpaid sick leave from June 5, 2004, to September 12, 2004, sick leave with half pay from September 13, 2004, to September 24, 2004, "Worker's Compensation leave (unpaid; City paid benefits)" from September 25, 2004, to April 1, 2005, and paid administrative leave from April 2, 2005, to June 26, 2005.

not he can re-enter full-duty police work or whether that will not be possible." Raffle conducted a fitness for duty evaluation of Yanke and approved his return to a temporary light duty assignment.

On June 21, 2005, the City wrote to Yanke, stating it had received his "Treating Physician's request for a short term/trial accommodation in an attempt to evaluate the likelihood of your permanent return to work as a Police Officer for the City of Oakland." The City informed Yanke, "The Department has identified a temporary position in the Information Technology Unit. This is a temporary position. As a further accommodation, and also per your doctor's request, Oakland Police will accommodate your schedule to permit the continuance of your bi-weekly medical appointments with your physician . . . ." (Emphasis omitted.) Yanke began working in the Information Technology Unit on June 27, 2005.

On February 16, 2006, Berg wrote to the City, stating he was still treating Yanke on a regular basis. He stated, "at this time his situation and condition have not changed to the extent that he can be considered for regular duty, particularly street assignments. Therefore, I am respectfully requesting that he be allowed to continue in his current assignment, or any one that is equivalent to that, for at least another 90 days. At the end of that time, if appropriate, I will inform you as to whether or not there has been any change in that situation." In a letter to the City dated July 19, 2006, Berg wrote that "his treatment [of Yanke] remains the same." On August 19, 2006, Berg wrote to the City stating, "[Yanke's] emotional condition continues to be pretty much the same . . . He continues not to be able to perform normal and regular police duties and his present placement in the Technology Unit seems to be working well and is not adverse to this condition."

On November 2, 2006, the City directed Yanke to report to a mandatory fitness for duty evaluation. Raffle examined Yanke on November 10, 2006, and issued a report detailing his findings regarding Yanke's "current state of psychiatric functioning." Raffle determined Yanke was unfit for duty and was not "capable of performing the essential functions of his job as a Police Officer for the Oakland Police Department with or

without accommodations." He noted that Yanke did not answer 32 questions on the MMPI-2, a psychological test. Raffle stated, "Butcher, a leading authority in MMPI-2 interpretations, considers a profile invalid when 30 or more questions are unanswered. Different motivational factors such as test-taking resistance or suspiciousness have been associated with high Cannot Say (omitted answers) scores [¶] . . . [¶] When a large number of items are unanswered, this can lead to the test interpreter being misled to underestimate the degree of psychopathology revealed in the profile. A good rule of thumb regarding police officers is that when a police officer refuses to answer more than 30 questions on the MMPI-2, it means he is trying to hide something and usually that has to deal with issues relating to his job or aggression." He opined that accommodation was not indicated and that "[u]ntil proven otherwise, [Yanke] should not be returned to duty."

In a letter to Yanke dated December 1, 2006, the City informed Yanke that Raffle "made a determination that you are currently unable to perform the essential functions of an Oakland Police Officer and that no accommodations are identified that could enable you to perform those essential functions. As such, effective immediately, you will be placed on paid sick leave until such time you are able to obtain a medical release from your personal treating physician which releases you to perform the essential functions of Police Officer, with or without accommodation. Upon receipt of said release, you will be reevaluated by the City's specialist to determine concurrence with your physician's findings and recommendations." The letter informed Yanke of his rights under the California Family Rights Act and the Americans with Disabilities Act (ADA) and advised him to contact the City for further information. On December 11, 2006, the City advised Yanke of his right to reasonable accommodation under the ADA and the Fair Employment and Housing Act.

On June 4, 2007, Yanke's attorney wrote to the chief of police, asking for clarification of Yanke's employment status and seeking "notice and an opportunity to respond to this adverse employment action . . . ." On July 3, 2007, the City informed Yanke that his status was sick leave without pay because his period of paid sick leave had

expired on April 3, 2007.[2] The City also noted that it had inadvertently overpaid him $10,163.44.[3] Yanke's attorney wrote to the chief of police on July 13, 2007, stating he "disputes the City of Oakland's adverse employment actions, disciplinary action, and/or the Department's interpretation or application of the [MOU]."

On July 18, 2007, Yanke filed a petition for a writ of mandate against the City seeking an order compelling the City to, among other things, "reinstate" him to his position as a police officer with full back pay and benefits and to provide him with an administrative hearing before imposing any action that "deprives him of his salary or benefits." The matter was heard by the trial court, which issued an order denying the petition on February 25, 2008. The trial court ruled the City did not violate Yanke's due process rights because Yanke was not entitled to a hearing under *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 215 (*Skelly*) before being placed on medical leave. It also determined that to the extent Yanke was entitled to due process as a permanent civil service employee, the City provided adequate due process because it "provided notice of the decision [to place him on medical leave], explained the basis of the decision and provided [him] with an opportunity to dispute the decision by submitting medical evidence from his treating physician." Finally, the trial court determined the City did not violate Yanke's rights under the Public Safety Officers Procedural Bill of Rights Act, Government Code section 3300 et seq., because the City's action was not "punitive."

DISCUSSION

Standard

The requirements for mandamus are (1) a clear, present duty on the part of the respondent, and (2) a clear, present and beneficial right in the petitioner to the performance of that duty. (Code Civ. Proc., §§ 1085, 1086.) In analyzing a due process claim, we first determine whether the plaintiff had a property interest subject to due

---

[2] Pursuant to the Memorandum of Understanding (MOU) between the City and the Oakland Police Officers' Association, Yanke was entitled to 60 days of paid sick leave and an additional 60 days of sick leave at half pay.

[3] The City apparently did not recoup the $10,163.44 overpayment.

process protection under the Fourteenth Amendment of the United States Constitution. (*Skelly, supra,* 15 Cal.3d at p. 206.) If we find such an interest existed, we then determine whether the defendant met due process requirements when it deprived the plaintiff of that interest. (*Id.* at pp. 207-208.) " 'Because [the] contention regarding procedural matters presents a pure question of law involving the application of the due process clause, we review the trial court's decision de novo.' [Citation.] Since the issue presented is on undisputed facts and one of law, we exercise our independent judgment. [Citation.] Further, to the extent we are called upon to interpret statutes or rules dealing with employment of public employees, such issues involve pure questions of law which we resolve de novo. [Citation.]" (*Bostean v. Los Angeles Unified School Dist.* (1998) 63 Cal.App.4th 95, 107-108 (*Bostean*).)

Property Interest

The Fourteenth Amendment " ' "places procedural constraints on the actions of government that work a deprivation of interests enjoying the stature of 'property' within the meaning of the Due Process Clause." ' " (*Bostean, supra,* 63 Cal.App.4th at p. 108, quoting *Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, 1112.) Property interests are not created by the federal Constitution but "are created, and their dimensions are defined[,] by existing rules or understandings that stem from an independent source such as state law." (*Bostean, supra,* 63 Cal.App.4th at p. 109.) Under California law, an individual employed in the public sector who has achieved the status of " 'permanent employee' " has "a property interest in the continuation of his [or her] employment which is protected by due process." (*Skelly, supra,* 15 Cal.3d at pp. 206-207.) That property interest extends to police officers. (*Hadley v. City of Ontario* (1974) 43 Cal.App.3d 121, 126.)

California courts have recognized that the protections of the due process clause extend to discipline of permanent public employees short of termination. For example, in *Civil Service Assn. v. City and County of San Francisco* (1978) 22 Cal.3d 552, 560 (*Civil Service Assn.*), the California Supreme Court acknowledged with respect to short-term suspensions of civil service employees that "[s]uspension of a right or of a temporary

right of enjoyment may amount to a 'taking' for 'due process purposes.' " In *Bostean, supra,* 63 Cal.App.4th at page 109, a Court of Appeal held that a public employee has a property interest in continuing to receive his or her salary and benefits.

Here, it is undisputed that Yanke was a permanent employee of the City. Accordingly, he had a property interest in the continuation of his salary and benefits.

Due Process

Due process, " 'unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' [Citation.]" (*Mathews v. Eldridge* (1976) 424 U.S. 319, 334 [an evidentiary hearing is not required prior to terminating social security disability benefits].) " '[D]ue process is flexible and calls for such procedural protections as the particular situation demands.' " (*Ibid*., quoting *Morrissey v. Brewer* (1972) 408 U.S. 471, 481.) "The essence of procedural due process is notice and an opportunity to respond." (*Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1279 (*Gilbert*).)

"[R]esolution of the issue whether the administrative procedures provided [in a particular case] are constitutionally sufficient requires analysis of the governmental and private interests that are affected. [Citation.]" (*Mathews v. Eldridge*, *supra*, 424 U.S. at p. 334.) "More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (*Id*. at pp. 334-335.)

In *Skelly, supra,* 15 Cal.3d at page 194, the California Supreme Court applied this balancing test to determine what process is due a public employee facing removal from employment. It held that a permanent employee with a property interest in continued employment is entitled to certain procedural safeguards before being removed from employment. While those due process safeguards do not include a full evidentiary

hearing before removal, minimally, they include "notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline." (*Id.* at p. 215.) *Civil Service Assn., supra,* 22 Cal.3d at page 560, applied the same balancing test in holding that an employer need not provide *Skelly*-type procedures to employees before suspending them for a period of five days. Noting that "historically the state has treated suspensions of 10 days or less as being somewhat minor with less procedural safeguards offered," (*id.* at p. 562) the court concluded the employees would receive adequate due process so long as the employer afforded them *Skelly*-like procedures "during . . . or within a reasonable time" after their five-day suspensions. (*Id.* at p. 564.)

Under the relevant balancing test, Yanke had a "significant interest" in continuing to receive his salary and benefits as a police officer with the City and was deprived of that interest after being placed on involuntary sick leave. (See *Gilbert v. Homar* (1997) 520 U.S. 924, 930; see also *Barberic v. City of Hawthorne* (C.D. Cal. 1987) 669 F.Supp. 985, 990 [employee was entitled to due process prior to being placed on involuntary disability retirement].) However, weighing against that interest was the City's substantial interest in not continuing to employ Yanke as a police officer after he was found unfit for duty, and in doing so in an " 'expeditious, efficient, and financially unburdensome manner.' " (See *Gilbert, supra,* 130 Cal.App.4th at p. 1279.) Further, the City had "substantial assurance that the deprivation [was] not baseless or unwarranted" before it placed Yanke on unpaid leave. (See *Bostean, supra,* 63 Cal.App.4th at pp. 112-113; see also *Skelly, supra,* 15 Cal.3d at p. 215 [a state law that "fail[ed] to accord the employee any prior procedural protections to 'minimize the risk of error in the initial removal . . .' " violated due process].) For over three years, Yanke's treating physician, Berg, opined that Yanke was "totally and temporarily disabled from performing any job duties," or was "not . . . able to perform normal and regular police duties." Berg also noted that Yanke's prior treating physician had also found Yanke to be "disabled." The City's medical specialist, Raffle, who had previously found Yanke was fit for duty, opined in his report

of November 10, 2006, that he could not recommend that Yanke return to his position as a police officer and could not identify any accommodations that would enable Yanke to return to work.

Moreover, the City provided notice to Yanke of Raffle's findings, and Yanke does not dispute that he received a copy of Raffle's report, or that he was aware of the bases for Raffle's lack of fitness findings.[4] The City allowed Yanke the opportunity to obtain a release from Berg that would allow him to return to his job as a police officer, with or without accommodation. Further, the City placed Yanke on paid leave for 60 days and provided him with an additional 60 days of leave at half pay pursuant to the MOU (of which Yanke also does not deny he was aware), allowing him the opportunity to respond while he was still on paid leave.[5] We agree with the City that it could not indefinitely pay Yanke given his lack of fitness to perform as a police officer, and Yanke does not assert or cite to any authority supporting a conclusion that he was entitled to work permanently in the Information Technology Unit. In fact, it has been held that "[i]t is self-evident that a public employer may require an employee to meet physical or mental standards reasonably related to the duties required by the job and the health and safety of the employee or others." (*Sienkiewicz v. County of Santa Cruz et al.* (1987) 195 Cal.App.3d 134, 142.) " 'Although a permanent employee's right to continued

---

[4] It is the City's standard procedure to release fitness for duty reports to the employee being examined. Here, Raffle was not instructed to withhold the report. Yanke, who attached the report to his memorandum of points and authorities in support of his petition for a writ of mandate, does not deny he received the report before being placed on medical leave.

[5] Yanke contends the MOU provision regarding sick leave pay applies only to employee-initiated sick leave and should therefore not have applied to him. He cites the language of the MOU, which provides, "An employee shall be entitled to sixty (60) calendar days of sick leave without loss of pay for each injury or illness. If, after the sixty (60) calendar days, the injury or illness continues, said employee shall be entitled to half pay for an additional period of sixty (60) days," and argues that "[t]he plain language of the above provision of the MOU shows without a doubt that the City and the Oakland Police Officers' Association intended that it regulate employee initiated leave of absences." The plain language of the provision, however, does not require the employee to initiate the sick leave. His contention is therefore without merit.

employment is generally regarded as fundamental and vested, an employee enjoys no similar right to continuation in a particular job assignment.' " (*Ibid*.) We conclude the City's actions were sufficient to provide Yanke with notice that he could not continue to receive his salary and benefits as a police officer because he was unfit to perform the essential duties of his job, with or without accommodation. (See *Skelly*, *supra,* 15 Cal.3d at p. 215.)

Bostean, *supra,* 63 Cal.App.4th 95, on which Yanke relies for the proposition that he was entitled to an administrative hearing, is distinguishable. There, the Los Angeles Unified School District (the district) placed its employee, Bostean, on involuntary medical leave without pay for seven months. (*Bostean*, *supra*, 63 Cal.App.4th at p. 105.) Bostean's treating physician submitted a report to the district in which he stated that Bostean was capable of performing the essential duties of his position, with certain limitations. (*Id.* at p. 101.) The district's human resources department subsequently concluded that Bostean could not perform the essential functions of his position. (*Id.* at p. 102.) Bostean was therefore deprived of pay based on a medical conclusion made by a non-physician. In contrast, here, Raffle determined after examination that Yanke could not perform the essential functions of a police officer. Raffle's decision was in accord with that of Yanke's treating physician, who opined for over three years that Yanke was "totally and temporarily disabled" from performing the duties of a police officer. Further, in *Bostean*, the district placed Bostean on unpaid leave for seven months immediately after notifying him of its decision to place him on medical leave, and kept him on unpaid leave despite his treating physician's report that he was capable of performing the essential duties of his position, with certain limitations. (*Id.* at p. 101, 105.) In contrast, here, Yanke was provided with a significant opportunity to respond to Raffle's report with no reduction in pay for 60 days, and another 60 days of half pay. Thus, unlike in *Bostean*, here, the City's procedures included safeguards to ensure that the correct decision was made.

Public Safety Officers Procedural Bill of Rights Act

Yanke contends the City violated his rights under the Public Safety Officers Procedural Bill of Rights Act (the Act), Government Code section 3300 et seq., when it placed him on indefinite sick leave without pay. Section 3304, subdivision (b), of the Act provides that "No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency against any public safety officer who has successfully completed the probationary period that may be required by his or her employing agency without providing the public safety officer with an opportunity for an administrative appeal." Section 3303 defines "punitive action" as "any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment." Yanke contends he was entitled to an administrative appeal because his salary was reduced when he was placed on involuntary sick leave. He relies primarily on *White v. County of Sacramento* (1982) 31 Cal.3d 676 (*White*), but the case does not support his contention.

In *White*, the sole question presented was whether a public safety officer who was reassigned to a lower paying position based on deficient performance was the subject of " 'punitive action' " and therefore entitled to an administrative appeal under the Act. (*White, supra,* 31 Cal.3d at p. 679.) The Court rejected the employer's argument that the officer was not entitled to a hearing because he was reassigned for "deficient performance," and not as "punishment for misconduct." (*Id*. at pp. 679-680.) It also rejected the employer's argument that the phrase in section 3304, subdivision (b), " 'for purposes of punishment' " qualified each of the preceding terms, thereby precluding from the reach of the statute " 'demotions' " or " 'reductions in salary' " that were not imposed " 'for purposes of punishment.' " (*Id.* at p. 679.) The Court held that in light of the Legislature's intent to "provide the right of administrative appeal to a peace officer *against whom disciplinary action is taken*," "a decision to reassign a peace officer to a lower paying position [was] per se disciplinary, or punitive in nature, and that the officer therefore must be accorded the 'opportunity for [an] administrative appeal.' " (*Id*. at pp. 683-684, italics added.) In so holding, the Court cautioned that "this case deals only

with the availability of an administrative appeal where '*punitive action*' is taken against an individual officer . . . [and that the] case does not concern, for example, mass layoffs occasioned by a reduction of personnel due to budgetary constraints." (*Id.* at p. 679, fn. 3, italics added, see also p. 683, fn. 4.)

White does not stand for the proposition that placing an individual on sick leave when that person's physician has indicated that the individual is unable to perform the essential duties of his position constitutes a "reduction in salary" or any other type of punitive action that would trigger the appeal provisions of section 3304, subdivision (b). In contrast to the officer in *White* who was demoted for deficient performance, the record here clearly establishes that Yanke's placement on sick leave was not a disciplinary sanction. As importantly, placing Yanke on sick leave did not "reduce his salary."[6] Yanke's salary remains the same and upon his return to work, his salary will be no less than before.

The purpose of the Act is to provide the right of administrative appeal to a peace officer who is subjected to disciplinary or other punitive action. There is nothing in the record here suggesting anything punitive or disciplinary in the City's actions. Thus, the administrative appeal right provided in the Act did not apply, notwithstanding the loss of pay.

The other cases on which Yanke relies are similarly distinguishable because they all involved disciplinary acts that employers took against employees for alleged deficient performance. In *Henneberque v. City of Culver City* (1983) 147 Cal.App.3d 250, 254, the Court held that a public safety officer who was summarily demoted for alleged unsatisfactory performance was entitled to an administrative appeal under the Act because the employer's act of demoting him and reducing his pay was a "punitive" act. Similarly, in *McManigal v. City of Seal Beach* (1985) 166 Cal.App.3d 975, 981, the Court held the employer's act was "punitive" within the meaning of the Act and the peace officer was therefore entitled to an administrative appeal under the Act where

---

[6] We note that Yanke's placement on sick leave is subject to reevaluation upon receipt of a medical release from his physician.

"[t]he record makes it clear [the officer's] transfer [and reduction in pay] was the result of his supervisor's evaluation of his performance." *Runyan v. Ellis* (1996) 40 Cal.App.4th 961, 964, also involved a peace officer who was temporarily transferred and subject to a reduction in pay as discipline for poor performance. The Court held the officer was entitled to an administrative appeal under the Act because the action taken against him was "punitive," i.e., "for purposes of punishment for the numerous instances of infractions." (*Ibid*.) The cases do not provide support for Yanke's position that he was entitled to an administrative appeal under the Act.

DISPOSITION

The trial court's order denying Yanke's petition for a writ of mandate is affirmed. The City shall recover its costs on appeal.

_____
McGuiness, P.J.

We concur:

_____
Pollak, J.

_____
Jenkins, J.